UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 15 2006

THE ADMINISTRATOR

Mr. Robert Manning, Esq.
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123 South Calhoun Street
Tallahassee, Florida 32301

Dear Mr. Manning:

The Environmental Protection Agency has reviewed the requests in the July 2005 petition for reconsideration and stay of the Clean Air Interstate Rule (CAIR) that you filed on behalf of the Florida Association of Electric Utilities (FAEU or Petitioner). This petition asks EPA to reconsider several specific aspects of the CAIR. As you are aware, EPA has already responded to parts of this petition. By letter dated August 1, 2005, we denied your request to stay implementation of CAIR in the State of Florida. In addition, by letter dated November 21, 2005, we indicated our intent to grant reconsideration of at least one issue in your petition. Subsequently, on December 2, 2005, we published a Federal Register notice initiating a reconsideration process on four issues, including one raised by Petitioner. After careful consideration and for the reasons explained below, EPA denies the remaining requests in your petition for reconsideration.

The CAIR, published in the Federal Register on May 12, 2005 (70 FR 25162), is a powerful component of the Bush Administration's plan to help over 450 counties in the eastern United States meet air quality standards for ozone and fine particles (PM2.5). EPA determined that reductions in upwind precursor emissions will assist downwind areas in meeting the national ambient air quality standards (NAAQS). EPA also determined that attainment will be achieved in a more equitable, cost-effective manner than if each nonattainment area attempted to achieve attainment with the ozone and fine particle NAAQS by implementing local emissions reductions alone. The CAIR was developed through a process that involved extensive public participation. We received and responded to thousands of comments and held public hearings in February and June 2005. The robust public dialogue was an important part of the rulemaking process.

EPA recognizes the continuing significant public interest in the CAIR. Following publication of the rule, EPA received twelve separate petitions for reconsideration, including the one you submitted. In response, EPA granted reconsideration on and reopened for public comment the following six issues:

(1) the definition of "Electric Generating Units (EGU)" as it relates to solid waste incinerators (70 FR 49708, 49738);

(2) claims that inequities result from the sulfur dioxide (SO2) allocation methodology to be used by States participating in the EPA-administered trading program (70 FR 72268, 72272);

(3) EPA's use of fuel adjustment factors (1.0 for coal, 0.6 for oil, and 0.4 for gas) in establishing State nitrogen oxides (NOx) budgets (70 FR 72268, 72276);

(4) certain inputs to the fine particle (PM2.5) modeling used to determine whether Minnesota should be included in the CAIR region for PM2.5 (70 FR 72268, 72279);

(5) EPA's determination that Florida should be included in the CAIR ozone region (70 FR 72268, 72280); and,

(6) the impact of New York v. EPA on certain analyses prepared for the final CAIR (70 FR 77101).

EPA published Federal Register notices announcing the reconsideration processes and requesting public comment on the issues under reconsideration. EPA is taking final action on reconsideration of these issues in a separate rulemaking signed today. One of the issues EPA decided to reconsider -- the inclusion of Florida in CAIR for ozone -- was raised by Petitioner. This issue is addressed in the notice of final action on reconsideration.

Your petition raises three additional issues. First, you ask EPA to reconsider its decision to include the entire State of Florida in the CAIR region for PM2.5. Second, you ask EPA to reconsider the 0.2 $\mu g/m^3$ threshold used to determine whether a State's emissions significantly contribute to nonattainment or interfere with maintenance in downwind States. Third, you ask EPA to reconsider the 2009 compliance deadline for Phase I of the CAIR nitrogen oxides (NOx) emission reduction requirements. We address each of these issues in turn below. As noted, EPA has determined that reconsideration of these three issues is not warranted under section 307(d)(7)(B) of the Clean Air Act (CAA). Consequently, EPA is not required to respond to Petitioner's substantive arguments. Nonetheless, EPA briefly discusses each issue of concern to Petitioners.

Inclusion of Florida in the CAIR Region for PM2.5

Your petition asks EPA to reconsider its decision to include the entire State of Florida in the CAIR region for PM2.5. Petitioner argues that the southern portion of Florida should be excluded from the CAIR. EPA has carefully considered the information submitted by Petitioner. However, Petitioner neither submitted information to EPA sufficient to show that reconsideration of this issue is warranted under section 307(d)(7)(B) of the CAA nor submitted information sufficient to convince EPA that a change to its "whole-State modeling" approach for Florida is warranted. EPA thus denies Petitioner's request to reconsider this issue for the reasons explained below.

Petitioner does not establish that reconsideration of this issue is warranted under section 307(d)(7)(B) of the Clean Air Act. Petitioner argues that it had difficulty obtaining data used by EPA for PM2.5 modeling and in replicating EPA's results. However, this does not establish that it was impracticable for FAEU, during the available comment periods, to submit comments on EPA's modeling, EPA's determination that significant contribution should be determined on a State-wide basis, or on EPA's determination that Florida should be included in the CAIR for PM2.5. EPA proposed to include Florida in CAIR for PM2.5 in its January 2004 initial CAIR proposal and again in the Agency's June 2004 supplemental proposal (69 FR 4566, 4570 (Jan 30, 2004); 69 FR 32684, 32688-89 (June 10, 2004)). EPA also provided an additional opportunity to comment on the modeling platform to be used for the final CAIR through a notice of data availability published on August 6, 2004 (69 FR 47828). In addition, Petitioner states that its arguments regarding PM2.5 are related to objections/comments that they made on the proposed rule. These timely comments object to EPA's decision to include Florida in the CAIR PM2.5 region and request that EPA conduct additional modeling. The comments were submitted to the docket for the proposed rule within the required time frame. For these reasons, Petitioner has not met the standard for reconsideration and EPA therefore denies the request for reconsideration on this issue.

EPA also disagrees with any suggestion that it was impractical for Petitioner to comment on the modeling because it had not, by the end of the comment period, replicated EPA's modeling results. Without addressing whether Petitioner could have replicated EPA's modeling results during the requisite time frames,[1] EPA disagrees with Petitioner's premise that it was not practical for them to submit comments on the issues in question without first replicating EPA's final CAIR modeling results. Petitioner did submit, several months after this petition was submitted, modeling to show where a line could be drawn to separate the northern portion of Florida from the southern portion of the State such that the northern part exceeds EPA's threshold and the southern part does not. The fundamental issue Petitioner asks EPA to reconsider, however, is EPA's decision to determine significant contribution for Florida on a State-wide basis. In sum, the issue of evaluating significant contribution for the PM2.5 NAAQS on a State-wide basis was raised by EPA and commented on by Petitioner (albeit without any quantified demonstration that some areas in Florida do not contribute significantly). EPA responded to those comments. Petitioner thus had ample opportunity to comment on this issue and therefore has failed to show that reconsideration is warranted under section 307(d)(7)(B) of the CAA.

Further, Petitioner has not presented evidence sufficient to convince EPA that its "whole-

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[1] The modeling used for the CAIR proposals and the final CAIR is extremely complex and relies on data compiled from numerous sources. EPA provided notice and an opportunity to comment on its decision to use the model CMAQ4.3 for the final CAIR in a notice of data availability published on August 6, 2004 (69 FR 47828). EPA recognizes the difficulties inherent in duplicating complex modeling operations and is willing to work with stakeholders seeking additional information about its modeling platforms and inputs. EPA notes that Petitioner's first request for assistance in duplicating EPA's modeling results was received after the final CAIR was published.

State modeling" approach for Florida should be discarded. EPA has already presented its initial response to Petitioner's arguments on this issue in the Agency's response to the motion by FPL Group, Inc. and the Florida Association of Electric Utilities to stay CAIR. As explained in greater detail in those pleadings (which are part of the administrative record for this proceeding), EPA believes it properly determined that the entire State of Florida contributes significantly to downwind PM2.5 nonattainment. Petitioner argues that EPA should have included only the northern part of the State in the CAIR region for PM2.5. This argument is based on modeling, submitted after the petition was filed, that purports to show that it is possible to divide Florida into two regions, one with emissions just above EPA's significance threshold and one with emissions just below. These arguments do not demonstrate to EPA that its decision to model the effects of the entire State's emissions was improper.

Petitioner bases its argument on the court's decision in State of Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000). In this case, the Court held that EPA could make determinations of significant contribution on a State-wide basis, and that to include a portion of a State, EPA must demonstrate that the portion in question makes a "measurable contribution" to downwind nonattainment, 213 F.3d at 683-84. Even the modeling submitted by Florida demonstrates that the portion of the State that the Petitioner seeks to exclude makes a contribution to downwind nonattainment that is only marginally less than the contribution made by the portion they admit does make a significant contribution. Moreover, Petitioner presents no principled basis for dividing Florida in the manner they request. The only apparent rationale for the line they ask EPA to draw is that it is the place where one portion of the State meets the significance criteria and one purportedly does not. This entirely fails to satisfy the burden of demonstrating that EPA's modeling is "without rational relationship to the reality it purport[ed] to represent." Appalachian Power v. EPA, 249 F. 3d 1032, 1050 (D.C. Cir. 2001) (quoting Sierra Club v. EPA, 167 F. 3d 658, 662 (D.C. Cir. 1999).

In both State of Michigan, 213 F.3d at 684, and Appalachian Power Co. v. EPA, 249 F.3d at 1050, the Court held that EPA can regulate the sources in an entire State on the basis of collective contribution. EPA has applied that principle to Florida, and the modeling presented by Petitioner confirms, rather than rebuts, EPA's determination that sources throughout Florida significantly contribute to downwind nonattainment. As explained above, Petitioner has neither demonstrated to EPA that reconsideration of its PM2.5 modeling for Florida is warranted nor demonstrated that EPA's decision in the final CAIR was in error. For these reasons, EPA declines to reconsider this issue.

PM2.5 Threshold for Determining Significant Contribution

Petitioner also asks EPA to reconsider the 0.2 $\mu g/m^3$ significance threshold for PM2.5 that was used in EPA's air quality modeling analyses to determine whether a State's emissions contribute significantly to PM2.5 nonattainment or maintenance problems in a downwind State. Petitioner argues the PM2.5 threshold is arbitrary, inconsistent with other thresholds established by EPA, and unnecessary to protect public health. EPA disagrees for the reasons discussed below and declines to grant reconsideration on this issue because Petitioner has not shown reconsideration is warranted under section 307(d)(7)(B) of the CAA.

Petitioner had ample opportunity to comment on the PM2.5 significance threshold during the public comment period and has not shown either that it was impractical to raise their objection during the comment period or that the grounds for the objection arose after the comment period had closed. In the January 2004 CAIR proposal (69 FR 4566), EPA proposed a 0.15 $\mu g/m^3$ PM2.5 threshold, representing 1 percent of the annual PM2.5 NAAQS. EPA also provided analyses based on an alternative 0.10 $\mu g/m^3$ threshold and solicited comment on the use of higher or lower thresholds (69 FR 4584). In the proposal, EPA also explained the key factors it considered in selecting the threshold. During the comment period, EPA received numerous comments recommending the use of alternative thresholds, both higher and lower. EPA believes Petitioner had ample opportunity to comment on the PM2.5 threshold. In fact, the extensive public involvement was an important part of the decision making process. For these reasons, EPA concludes reconsideration is not warranted under section 307(d)(7)(B) of the Clean Air Act (CAA), and therefore denies Petitioner's request to reconsider this issue.

EPA also disagrees with Petitioner's contention that the 0.2 $\mu g/m^3$ threshold is inappropriate. Petitioner challenges EPA's choice of the 0.2 $\mu g/m^3$ for the PM2.5 threshold, but does not suggest that an alternative level would be more appropriate. Furthermore, Petitioner presents no basis for finding that EPA's action was arbitrary or capricious. Petitioner's argument that the significance level is much lower than the NAAQS is not relevant because EPA is not claiming that the 0.2 $\mu g/m^3$ level is necessary to protect human health and the environment, but rather is using it to determine what upwind States make a significant contribution to downwind nonattainment. As EPA explained in the CAIR preamble, EPA's modeling analyses indicate that generally PM2.5 nonattainment problems result from the combined impact of relatively small contributions from many upwind States, along with contributions from in-State sources, and in some cases, substantially larger contributions from a subset of States. This is in part due to the annual nature of the PM2.5 transport problem, which means that throughout the entire year and across a range of wind patterns, emissions from many upwind States affect the downwind PM2.5 nonattainment area. Therefore, in order to assist downwind areas in meeting the health-based PM2.5 NAAQS, EPA believes the threshold level is appropriate. In addition, the fact that EPA has used other levels to determine significance for different purposes is not relevant to EPA's decision that 0.2 $\mu g/m^3$ is appropriate for this particular purpose. In addition, EPA disagrees with Petitioner's argument that the PM2.5 threshold is not measurable because the modeling uncertainty is greater than the threshold and below current modeling/detection techniques. EPA uses the model outputs in a relative, rather than an absolute, sense, so that uncertainties are constrained by actual measured concentrations. With this technique, any absolute modeling bias is canceled out.

2009 NOx Compliance Date

Petitioner asks EPA to reconsider the 2009 compliance deadline for Phase I of the CAIR NOx emission reduction requirements. Petitioner claims EPA failed to provide an adequate opportunity for public comment on this deadline and asks EPA to change the deadline to January 1, 2010 or later. For the reasons below, EPA denies Petitioner's request. Petitioner has failed to show that reconsideration is warranted under section 307(d)(7)(B) of the CAA and has not presented any information sufficient to convince EPA that a reconsideration of the rulemaking is warranted under 5 U.S.C. § 553.

EPA provided numerous opportunities to comment on issues related to the Phase I NOx compliance deadline. EPA initially proposed a 2010 deadline, and received numerous comments regarding the practicality of this deadline and concerns about its relationship to the NAAQS compliance dates. In the Supplemental Notice of Proposed Rulemaking (SNPR), EPA acknowledged commenters' concerns that the proposed compliance dates would come too late for eastern States to meet their deadlines for coming into attainment with the 8-hour ozone NAAQS (69 FR 32690). In light of these comments, EPA explicitly invited comments on "all aspects of the issues concerning the timing to the proposed CAIR compliance dates" (69 FR 32690). EPA thus clearly indicated it was considering moving the deadline in response to comments that the 2010 deadline was too late and asked for public comment on the issue. Numerous parties submitted comments, including several groups who raised concerns about the impracticality of the compliance date. EPA considered all comments received but did not agree with the commenters who argued for a later compliance date. EPA responded to all significant comments either in the preamble or in a separate document responding to comments that is contained in the docket. As a result of these comments, and investigations conducted in response, EPA decided to change the compliance deadline for implementing Phase I NOx controls to January 1, 2009. EPA provided adequate opportunities for public comment on the NOx compliance deadline and the extensive public involvement was an important part of the decision-making process. Petitioner has failed to show either that it was impracticable to raise their objection during the public comment period, or that the grounds for the objection arose after the public comment period. Petitioner thus has not shown that reconsideration is warranted under section 307(d)(7)(B) of the Clean Air Act.

Further, Petitioner has not presented evidence sufficient to convince EPA that the 2009 compliance date should be changed. Petitioner argues that the 2009 date is arbitrary and unsupported by sound technical rationale. Among other things, Petitioner cites the difficulty in making necessary NOx reduction installations in conjunction with the design and implementation of SO2 controls. For these reasons, Petitioner argues that the compliance date for the CAIR-NOx programs should be changed to January 1, 2010 or later.

EPA disagrees. After careful consideration, EPA does not find merit with Petitioner's claim that the compliance date was arbitrary or its claim that installations are infeasible by January 1, 2009.

The 2009 compliance date is based on analysis of engineering, financial, and other factors that affect the timing for installing the emission controls that would be most cost-effective. The availability of boilermakers was identified as an important constraint in the notice of proposed rulemaking. EPA contacted the International Brotherhood of Boilermaker, U.S. Bureau of Labor Statistics, and National Association of Construction Boilermaker Employers to confirm assumptions regarding boilermaker population, and percentage of those available to work on control retrofit projects. This available capacity of this critical resource will be 15 percent above the amount required to meet the 2009 compliance date (70 FR 25216).

EPA also determined necessary selective catalytic reduction (SCR) installations could be made by 2009 according to the "Engineering and Economic Factors Affecting the Installation of

Control Technologies for Multi-Pollutant Strategies" (docket # EPA-HQ-OAR-2003-0053-0106). This report indicated an average of 21 months to install an SCR on one unit. The January 1, 2009 compliance date will allow additional time for multi-unit facilities to stagger their installations for up to three units without creating multi-unit outages (70 FR 25216). Further, numerous commenters suggested to EPA that a compliance date as early as January 1, 2008 would be preferable.

The primary concern addressed in the Petition appears to be the feasibility of engineering, procuring, installing, and testing controls within the time frame given by the 2009 compliance date, in particular at multi-unit sites where staggering the projects is necessary to avoid simultaneous outages. EPA estimates, which are based on actual data from SCR and scrubber installations, show 21 months would be required to complete the purchasing, construction, and start-up of SCR on one unit (70 FR 25221). The 2009 NOx compliance date would allow staggering on up to three units. For plants making installations on more than three units, simultaneous outages would occur. However, EPA estimates there will be only six facilities, so the resulting outages would not significantly impact the reliability of electricity supply.

In addition, CAIR has two mechanisms by which these outages can be avoided completely. The few plants installing more than three units at the same site would be able to avoid simultaneous outages by the following means:

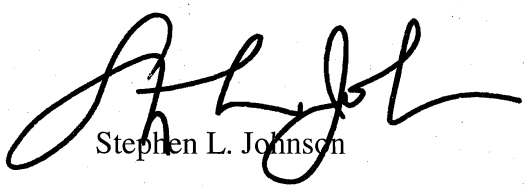
(1) These plants could defer installation on some units by receiving allowances from the 200,000 ton compliance supplement pool (CSP). The CSP is made available to assist those facilities that do not meet the 2009 compliance date.

(2) Four of the six plants performing installations on more than three units would be able to extend their outages into the first part of 2009, beyond the compliance date. As these facilities make installations on their fourth and final unit they would not be generating NOx emissions, and subsequently would not require any allowances to compensate for them.

The 2009 NOx compliance deadline in the CAIR is based on comprehensive analyses of labor, financial, and technical aspects affecting installation, and is feasible for the facilities to achieve. Petitioner has offered no information sufficient to convince EPA that the deadline should be moved, and EPA declines to reconsider the deadline.

Thank you for your interest in the final CAIR rule. EPA looks forward to working with you as implementation of the rule proceeds. If you have any questions about this letter, please contact Sonja Rodman in the Office of General Counsel at (202) 564-4079.

Sincerely,



Stephen L. Johnson